Goh Ah Thiam v CIMB Bank Bhd (formerly known as Southern Bank Bhd) (Boo Choon Kooy & Ors, third parties)

HIGH COURT (PENANG) — CIVIL SUIT NO 22–569 OF 2009
VARGHESE GEORGE JC
5 OCTOBER 2021

Civil Procedure — Appeal — Appeal against decision of deputy registrar — Assessment of damages caused by breach of undertaking and negligence of defendant — Whether plaintiff entitled to claim for loss of land — Whether valuation of land by plaintiff was too high — Whether defendant could raise new issues at hearing of assessment of damages — Whether the deputy registrar erred in assessing damages based on market value of land — Whether the principle of res judicata applied to the trial and hearing of assessment of damages — Whether the defendant estopped from raising issues not pleaded in defence during hearing of assessment of damages

The plaintiff had filed a suit against the defendant for the breach of an undertaking dated 14 March 2003 ('undertaking') and negligence in executing a discharge of charge afresh ('second discharge of charge') for the first third party ('PK 1') and the second third party ('PK 2') after having received full payment of the redemption sum in respect of the land and hereditaments known as Lot No 1710, Mukim 16, Daerah Seberang Perai Tengah, Geran No Pendaftaran 46333 ('agri-land') from the plaintiff. The plaintiff contended that the execution of the second discharge of charge by the defendant had facilitated the sale of the agri-land by PK 1 and PK 2 to a third party, namely, H Sue Ee Corp Sdn Bhd ('company') wherein the agri-land was transferred and registered in the name of the company on 5 September 2006 after the second discharge of charge was registered at the land registry on 7 July 2006. Thus, the plaintiff claimed against the defendant for damages suffered due to the breach of the undertaking and negligence of the defendant. Thereafter, third party proceedings were filed by the defendant against PK 1, PK 2 and PK 3 for indemnity and contribution on the grounds that any loss and damage suffered by plaintiff were caused by the act of PK 3 and/or misrepresentation or fraud by PK 1 and the PK 2. The third parties then filed their respective defences. After the trial, on 9 November 2015, the court allowed the plaintiff's claim against the defendant with costs and also held that the defendant's claim against the PK 1 and PK 2 be allowed with costs, whereas the claim against PK 3 was dismissed with costs. The defendant's appeal to the Court of Appeal and application for leave before the Federal Court were both dismissed. The plaintiff filed a notice for assessment of damages dated 22 August 2019 via encl 86 pursuant to the amended judgment dated 6 January 2016 ('judgment')

to have the damages suffered by the plaintiff, caused by the breach of undertaking and negligence of the defendant as adjudged by the court, assessed and quantified by the learned deputy registrar ('DR'). The defendant took the position that the plaintiff was not entitled to claim for the loss of the agri-land because of the judgment dated 19 May 2010 in Suit No 22–631 of 2003, which had the effect of extinguishing the plaintiff's rights and/or interest over the agri-land. The defendant further contended that, if at all the plaintiff was entitled to any loss and damage, the plaintiff's claim was confined to the return of the redemption sum of RM478,600 paid under the undertaking. The defendant also contended that the valuation of the agri-land given by the plaintiff was too high. After the hearing of encl 86, on 18 December 2020, the learned DR ordered and certified the quantum of damages in favour of the plaintiff. The defendant being dissatisfied with the learned DR's decision, filed a notice of appeal to the judge in chambers pursuant to O 56 of the Rules of Court 2012 ('the ROC').

Held, dismissing the appeal with costs:

(1) The court found the stand taken by the defendant during the hearing of encl 86 to be an afterthought and designed to avoid paying damages to the plaintiff, albeit liability had been conclusively established against the defendant after the trial. The hearing of assessment of the damages was essentially an extension and/or the second part of the trial process. The issue of liability has already been established at trial and affirmed during the appeal. At the hearing of assessment of damages, the defendant could not put forward issues that were not pleaded in their defence ie, relating to Suit No 22–631 of 2003, the judgment dated 19 May 2010, as well as the alleged effect of judgment dated 19 May 2010 on the right of the plaintiff to the agri-land. Once the defendant has taken a particular stance in its defence, it was not open for the defendant to change its position or put forward a new defence that was never pleaded. The principle of res judicata applied equally to the two stages of the case ie, the trial and the consequential hearing of assessment of damages. Hence, the defendant could not raise for a second time in the same suit an issue or matter that had already been considered and determined either expressly or by necessary implication (see paras 21– 22, 27 & 39).

(2) In light of the specific finding of facts by the learned judge that the negligence of the defendant had caused the loss of the agri-land by the plaintiff, the court held that the plaintiff had proven the fact of damages (liability) against the defendant. As such, the assessment of the damages pursuant to the judgment would be in respect of the loss of the agri-land caused by the negligence of defendant. Hence, the court found the defendant's contention at the hearing of encl 86, that the plaintiff was not entitled to claim the loss of the agri-land was without basis and was

contrary to the specific finding of facts made by the learned judge and affirmed by the Court of Appeal (see paras 46–47).

(3) In general, damages and/or loss ought to be assessed at the date of the judgment, ie, 9 November 2015. In light of the judgment that the defendant was liable to the plaintiff for the loss of the agri-land, the court held that the open market value of the agri-land would be the appropriate quantum for the loss suffered by the plaintiff. Thus, the court found that the learned DR did not err in the assessment of damages as the sum of RM5,583,000 was based on the market value of the agri-land. Further, the court found that the learned DR was correct in assessing the market value of the agri-land as at the date of judgment as the loss suffered by the plaintiff and also in awarding RM28,000 as special damages being the cost of the valuation reports (see paras 50–51 & 59–60).

[Bahasa Malaysia summary

Plaintif telah memfailkan tindakan terhadap defendan kerana melanggar akujanji bertarikh 14 Mac 2003 ('akujanji') dan kecuaian dalam melaksanakan pelepasan gadaian baru ('pelepasan gadaian kedua') untuk pihak ketiga pertama ('PK 1') dan pihak ketiga kedua ('PK 2') selepas menerima bayaran penuh jumlah penebusan berkenaan dengan tanah dan pusaka yang dikenali sebagai Lot No 1710, Mukim 16, Daerah Seberang Perai Tengah, Geran No Pendaftaran 46333 ('tanah pertanian') daripada plaintif. Plaintif berpendapat bahawa pelaksanaan pelepasan gadaian kedua oleh defendan telah memudahkan penjualan tanah pertanian oleh PK 1 dan PK 2 kepada pihak ketiga, iaitu, H Sue Ee Corp Sdn Bhd ('syarikat') di mana tanah pertanian telah dipindahmilik dan didaftarkan atas nama syarikat pada 5 September 2006 selepas pelepasan gadaian kedua didaftarkan di pejabat pendaftaran tanah pada 7 Julai 2006. Oleh itu, plaintif menuntut terhadap defendan untuk ganti rugi yang dialami akibat pelanggaran akujanji dan kecuaian defendan. Selepas itu, prosiding pihak ketiga difailkan oleh defendan terhadap PK 1, PK 2 dan PK 3 untuk ganti rugi dan kerugian atas alasan bahawa sebarang kerugian dan kerosakan yang dialami oleh plaintif adalah disebabkan oleh perbuatan PK 3 dan/atau salah nyata atau penipuan oleh PK 1 dan PK 2. Pihak ketiga kemudiannya memfailkan pembelaan masing-masing. Selepas perbicaraan, pada 9 November 2015, mahkamah membenarkan tuntutan plaintif terhadap defendan dengan kos dan juga memutuskan bahawa tuntutan defendan terhadap PK 1 dan PK 2 dibenarkan dengan kos, manakala tuntutan terhadap PK 3 ditolak dengan kos. Rayuan defendan kepada Mahkamah Rayuan dan permohonan kebenaran di hadapan Mahkamah Persekutuan kedua-duanya ditolak. Plaintif memfailkan notis untuk taksiran ganti rugi bertarikh 22 Ogos 2019 melalui lampiran 86 menurut penghakiman pindaan bertarikh 6 Januari 2016 ('penghakiman') untuk mendapatkan ganti rugi yang dialami oleh plaintif, disebabkan oleh pelanggaran akujanji dan kecuaian defendan sebagaimana yang ditentukan oleh mahkamah, dinilai dan ditaksir oleh

timbalan pendaftar yang bijaksana ('TP'). Defendan mengambil pendirian bahawa plaintif tidak berhak menuntut kehilangan tanah pertanian kerana penghakiman bertarikh 19 Mei 2010 dalam Guaman No 22–631 Tahun 2003, yang mempunyai kesan memadamkan hak plaintif dan/atau kepentingan ke atas tanah pertanian. Defendan seterusnya berhujah bahawa, sekiranya pada semua plaintif berhak kepada sebarang kerugian dan kerosakan, tuntutan plaintif terhad kepada pemulangan jumlah penebusan sebanyak RM478,600 yang dibayar di bawah akujanji tersebut. Defendan juga berhujah bahawa penilaian tanah pertanian yang diberikan oleh plaintif adalah terlalu tinggi. Selepas pendengaran lampiran 86, pada 18 Disember 2020, TP yang bijaksana memerintahkan dan memperakui kuantum ganti rugi yang memihak kepada plaintif. Defendan tidak berpuas hati dengan keputusan TP yang bijaksana, memfailkan notis rayuan kepada hakim dalam kamar menurut A 56 Kaedah-Kaedah Mahkamah 2012 ('KKM').

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah mendapati pendirian yang diambil oleh defendan semasa perbicaraan lampiran 86 adalah satu pemikiran semula dan direka untuk mengelak daripada membayar ganti rugi kepada plaintif, walaupun liabiliti telah dibuktikan secara muktamad terhadap defendan selepas perbicaraan. Perbicaraan penilaian ganti rugi pada dasarnya adalah lanjutan dan/atau bahagian kedua proses perbicaraan. Isu liabiliti telah pun diwujudkan dalam perbicaraan dan disahkan semasa rayuan. Semasa perbicaraan taksiran ganti rugi, defendan tidak boleh mengemukakan isu yang tidak diplidkan dalam pembelaan mereka iaitu, berkaitan dengan Guaman No 22–631 Tahun 2003, penghakiman bertarikh 19 Mei 2010, serta dakwaan kesan penghakiman bertarikh 19 Mei 2010 terhadap hak plaintif ke tanah pertanian. Apabila defendan telah mengambil pendirian tertentu dalam pembelaannya, defendan tidak terbuka untuk menukar kedudukannya atau mengemukakan pembelaan baharu yang tidak pernah dplidkan. Prinsip res judicata terpakai secara sama rata pada dua peringkat kes iaitu perbicaraan dan pendengaran lanjutan bagi taksiran ganti rugi. Oleh itu, defendan tidak boleh membangkitkan untuk kali kedua dalam tindakan yang sama isu atau perkara yang telah dipertimbangkan dan ditentukan sama ada secara nyata atau dengan implikasi yang wajar (lihat perenggan 21–22, 27 & 39).

(2) Berdasarkan dapatan fakta khusus oleh hakim yang bijaksana bahawa kecuaian defendan telah menyebabkan kehilangan tanah pertanian oleh plaintif, mahkamah memutuskan bahawa plaintif telah membuktikan fakta ganti rugi (liabiliti) terhadap defendan. Oleh itu, penilaian ganti rugi menurut penghakiman adalah berkenaan dengan kehilangan tanah pertanian yang disebabkan oleh kecuaian defendan. Oleh itu, mahkamah mendapati pertikaian defendan pada perbicaraan lampiran 86, bahawa plaintif tidak berhak untuk menuntut kehilangan tanah pertanian

tersebut adalah tanpa asas dan bertentangan dengan dapatan khusus fakta yang dibuat oleh hakim yang bijaksana dan disahkan oleh Mahkamah Rayuan (lihat perenggan 46–47).

(3) Secara amnya, ganti rugi dan/atau kerugian hendaklah dinilai pada tarikh penghakiman, iaitu, 9 November 2015. Berdasarkan penghakiman bahawa defendan bertanggungjawab kepada plaintif atas kehilangan tanah pertanian, mahkamah memutuskan bahawa nilai pasaran terbuka tanah pertanian akan menjadi kuantum yang sesuai untuk kerugian yang dialami oleh plaintif. Justeru, mahkamah mendapati TP yang bijaksana tidak terkhilaf dalam taksiran ganti rugi kerana jumlah RM5,583,000 adalah berdasarkan nilai pasaran tanah pertanian. Selanjutnya, mahkamah mendapati bahawa TP yang bijaksana adalah betul dalam menafsirkan nilai pasaran tanah pertanian pada tarikh penghakiman kerana kerugian yang dialami oleh plaintif dan juga dalam memberikan RM28,000 sebagai ganti rugi khas sebagai kos laporan penilaian (lihat perenggan 50–51 & 59–60).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Hoystead v Commissioner of Income Tax [1962] AC 155, PC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)

Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] MLRA 164, CA (refd)

Legislation referred to

Rules of Court 2012 O 56

MY Tung (Tung Chan & Partners) for the plaintiff.

Ghazi Ishak (Jeyasingam and Nurul Ishtar with him) (Ghazi & Lim) for the defendant.

Varghese George JC:

INTRODUCTION

[1] The plaintiff filed a notice for assessment of damages dated 22 August 2019 via encl 86 pursuant to the amended judgment dated 6 January 2016 ('judgment') to have the damages suffered by the plaintiff, caused by the breach

of undertaking and negligence of the defendant as adjudged by this court, assessed and quantified by the learned deputy registrar ('DR'). A

[2] After the hearing of encl 86, on 18 December 2020, the learned DR ordered and certified, as follows: B

(i) Defendan diperintahkan membayar kepada plaintif wang berjumlah RM5,583,000.00 berserta faedah 4% setahun dikira dari tarikh guaman difailkan, dan faedah 5% setahun dikira dari tarikh penghakiman (09/11/2015) sehingga penyelesaian penuh jumlah taksiran;

(ii) Defendan diperintahkan membayar kepada plaintif wang berjumlah RM28,500.00 sebagai gantirugi khas iaitu kos bagi penyediaan Laporan Penilaian; dan C

(iii) Kos sejumlah RM5,000.00 sebagai tindakan ini.

[3] The defendant being dissatisfied with the learned DR's decision, filed a notice of appeal to judge in chambers on 28 December 2020 pursuant to O 56 of the Rules of Court 2012 ('the ROC'). D

BRIEF BACKGROUND FACTS E

[4] The following brief facts are gleaned from the cause papers and the submissions of the parties filed herein.

[5] The suit herein was filed by the plaintiff against the defendant for breach of the undertaking dated 14 March 2003 ('undertaking') and negligence in executing the discharge of charge afresh ('second discharge of charge') for the first third party ('PK 1') and the second third party ('PK 2') after having received full payment of the redemption sum in respect of the land and hereditaments known as Lot No 1710, Mukim 16, Daerah Seberang Perai Tengah, Geran No Pendaftaran 46333 ('agri-land') from the plaintiff. F G

[6] The plaintiff contended that the execution of the second discharge of charge by the defendant had facilitated the sale of the agri-land by PK 1 and PK 2 to a third party, namely, H Sue Ee Corp Sdn Bhd ('company') wherein the agri-land was transferred and registered in the name of the company on 5 September 2006 after the second discharge of charge was registered at the land registry on 7 July 2006. H

[7] Thus, the plaintiff claimed against the defendant for damages suffered due to the breach of the undertaking and negligence of the defendant. I

[8] In their defence, the defendant contended that they had discharged their obligations under the undertaking by delivering the documents

mentioned therein to the third third party ('PK 3') who represented the plaintiff for the purchase of the agri-land. The documents delivered to PK 3 were the first discharge of charge, the original title to the agri-land and the relevant duplicate charge.

[9] The defendant also denied any breach of the undertaking and negligence and asserted that any loss and damage suffered by plaintiff were caused by the act of PK 3 and/or misrepresentation or fraud by PK 1 and PK 2.

[10] Further and/or in the alternative, the defendant contended that the plaintiff was guilty of contributory negligence by the following acts:

(a) failure to register the first discharge of charge;

(b) failure to inform the defendant of the non-registration of the first discharge of charge;

(c) failure to enter a caveat against and/or maintain a caveat on the agri-land; and

(d) failure to register the transfer of the agri-land.

[11] Thereafter, third party proceedings were filed by the defendant against PK 1, PK 2 and PK 3 for indemnity and contribution on the grounds that any loss and damage suffered by plaintiff were caused by the act of PK 3 and/or misrepresentation or fraud by PK 1 and the PK 2. The third parties then filed their respective defences.

[12] At the trial, the issues agreed for determination between the plaintiff and the defendant were as follows:

(a) whether the defendant had acted in breach of the undertaking by executing the second discharge of charge for PK 1 and PK 2 which facilitated the transfer of the agri-land to the company;

(b) whether the defendant was negligent by executing the second discharge of charge for PK 1 and PK 2 when the documents stated in the undertaking had been delivered to PK 3 on 15 April 2003 after the payment of the redemption sum for the agri-land by the plaintiff;

(c) whether the plaintiff had suffered loss and damage because of the execution of the second discharge of charge for PK 1 and PK 2 by the defendant;

(d) in the event the plaintiff had suffered loss and damage, whether the plaintiff was guilty of contributory negligence in respect of the loss and damage; and

(e) whether the defendant was under a duty to execute the second discharge of charge for PK 1 and PK 2 when the agri-land had been fully redeemed.

[13] After trial, on 9 November 2015, this court allowed the plaintiff's claim against the defendant with costs and also held that the defendant's claim against the PK 1 and PK 2 be allowed with costs, whereas the claim against PK 3 was dismissed with costs.

[14] In the grounds of judgment, the learned judge found that the defendant had breached the undertaking and ruled that the defendant was negligent in its failure to make the necessary inquiry as to the whereabouts of the documents stated in the undertaking. The learned judge in conclusion held that the defendant was liable to plaintiff for the loss and damage and that the negligence of the defendant had caused the loss of the agri-land to the plaintiff.

[15] The defendant's appeal to the Court of Appeal and application for leave before the Federal Court were both dismissed.

Enclosure 86

[16] At the hearing of encl 86, the defendant took the position that the plaintiff was not entitled to claim for the loss of the agri-land because of the judgment dated 19 May 2010 in Suit No 22–631 of 2003, had the effect of extinguishing the plaintiff's rights and/or interest over the agri-land.

[17] The defendant further contended that, if at all the plaintiff were entitled to any loss and damage, the plaintiff's claim was confined to the return of the redemption sum of RM478,600 paid under the undertaking. The defendant also contended that the valuation of the agri-land given by the plaintiff was too high.

Suit No 22–631 of 2003

[18] The defendant did not plead in their defence, of any issues relating to Suit No 22–631 of 2003 and the judgment dated 19 May 2010, nor raise the alleged effect of the said judgment in extinguishing the right and interest of plaintiff to the agri-land.

[19] Nevertheless, the writ and statement of claim for Suit No 22–631 of 2003 and the judgment dated 19 May 2010 were both tendered by the defendant during trial and marked as exhibits.

A FINDINGS

[20] Having considered all the relevant cause papers and the submissions of the parties, both written and oral, together with the authorities cited, I find that there is no merit in the defendant's appeal, for the reasons explained hereinafter.

Issue estoppel and res judicata

[21] I find the stand taken by the defendant during the hearing of encl 86 to be an afterthought and designed to avoid paying damages to the plaintiff, albeit liability has been conclusively established against the defendant after the trial.

[22] The hearing of assessment of the damages is essentially an extension and/or the second part of the trial process. The issue of liability has already been established at trial and affirmed during the appeal.

[23] No fresh pleadings are filed to either establish or deny liability for the hearing assessment of the damages. The affidavits filed and the cross examination of witnesses in respect of the hearing of encl 86 are strictly in respect assessment of damages. And, the parties are bound by the pleadings filed and used during the trial at the hearing assessment of the damages.

[24] It is also pertinent to note that the defendants did not file any application to amend their defence before the hearing of encl 86. The defendant relied on the very same defence that was canvassed during the trial.

[25] Hence, at the hearing for the assessment of damages, the plaintiff is required to prove his losses based on his pleadings in the statement of claim, and the defendant is entitled to challenge or dispute the losses in accordance with the pleaded defences.

[26] In *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, Ramly Ali FCJ, delivering the judgment of the Federal Court held:

> [29] It is a cardinal rule in civil litigation that *parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded* (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490; [1985] 1 LNS 117; and *Anuar Mat Amin v Abdullah Mohd Zain* [1989] 3 MLJ 313; [1989] 1 LNS 74). In *Blay v Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: *Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment.*
>
> [30] The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ 667; [1991] 1 CLJ Rep 239, had also emphasised the

importance of pleadings and ruled that *where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal* (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 CLJ 551 (FC)).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157; [1974] 1 LNS 178, had also pointed out that as 'the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also: *Haji Mohamed Dom v Sakiman* [1956] MLJ 45; [1955] 1 LNS 26; and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1963] 1 LNS 59; [1964] MLJ 99).

[32] Based on the above observation and principle, we are of the view that the 'last minute' issue raised by Mr Gobind Singh Deo, co-counsel for the appellant, that at the time when the sale and purchase agreements with the earlier purchasers were executed, MPM was not the registered proprietor/owner of the land must be disregarded and not to be considered at all in determining the appeal before us. In doing so, we adopt the observation by HRH Raja Azlan Shah CJ (as HRH then was) in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10]; [1980] 1 LNS 169:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be a great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[33] *The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case*.

[34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (kl) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, ... once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an unpleaded case ... (Emphasis added.)

[27] Therefore, at the hearing of assessment of damages, the defendant cannot put forward issues that are not pleaded in theirdefence ie, relating to Suit No 22–631 of 2003, the judgment dated 19 May 2010, as well as the alleged effect of judgment dated 19 May 2010 on the right of the plaintiff to the agri-land. Once the defendant has taken a particular stance in its defence, it is not open for the defendant to change its position or put forward a new defence that was never pleaded.

[28] Further, the defendant took the stand during trial that if any action on the part of the defendant had resulted loss and damage to the plaintiff, such action of the defendant was caused by the conduct of PK 3 and/or misrepresentation of PK 1 and PK 2.

[29] In this regard, since the defendant's claim against PK 1 and PK 2 by way of third party proceedings was allowed, the defendant is to proceed to execute against PK 1 and PK2. However, this does not in any way absolve the defendant's liability to pay the plaintiff.

[30] Additionally, as the issues pertaining to judgment dated 19 May 2010 are not pleaded in its defence, the defendant is estopped from raising the same during the hearing of encl 86.

[31] This is because, although the issues in relation to Suit No 22–631 of 2003 and judgment dated 19 May 2010 are not pleaded in the defence, and despite the writ and statement of claim for Suit No 22–631 of 2003 and judgment dated 19 May 2010 were tendered in evidence during the trial, it was held that the defendant was negligent in the execution of the second discharge of charge and that such act of the defendant effectively caused the loss of the agri-land to the plaintiff.

[32] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, Peh Swee Chin SCJ, delivering the judgment of the Supreme Court, stated:

> On the other hand, the *issue estoppel* literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie that *neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties*. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawdor v Gray* [1984] 3 All ER 345, 350 who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action'. (Emphasis added.)

[33] The Supreme Court also referred to the case of *Hoystead v Commissioner of Income Tax* [1962] AC 155, wherein the Privy Council, inter alia, held, 'though in previous litigation, no express decision was given whether the daughters were such joint owners, it being assumed and admitted they were; the admission that they were joint owners having been fundamental to the previous decision, the commissioner was estopped from asserting before the judicial committee that the daughters were not joint owners'.

[34] Hence, since the writ and statement of claim for Suit No 22–631 of 2003 and judgment dated 19 May 2010 were in evidence during trial, it can

be safely assumed that these issues were considered and rejected not only at the trial, but also during the appeal in the Court of Appeal and at the hearing of the leave application at the Federal Court.

[35] Accordingly, it would be res judicata for the defendant to raise issues in relation to Suit No 22–631 of 2003 and judgment dated 19 May 2010 at the hearing of encl 86.

[36] Similarly, the defendant cannot now avail itself of the same issues during this appeal in respect of enclosure 86.

[37] In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, Gopal Sri Ram JCA (as His Lordship then was) delivering the judgment of the Court of Appeal, said:

> If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76):
>
> > In *Satyadhyan Ghosel & Ors v Sint Deorajin Dobi and another* AIR 1960 SC 941, the statement of the law on the subject is given thus:
> >
> > > The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a resis judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. *When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again*. This principle of res judicatais embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicatahas been applied by courts for the purpose of achieving finality in litigation. *The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct*.
> > >
> > > *The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings*.
> >
> > A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v Marriott* (1883) 22 Ch D 182, *Hook v Administrator-General of Bengal & Ors* (1921) LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v Tan Yew Ghee and another* [1936] MLJ 141 at pp 147–151). Parties cannot

A raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

(See Louis Dreyfus v Aruna Chalayya LR 58 IA 381). (Emphasis added.)

B *A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings*. (Emphasis added.)

[38] Thus, I am unable to agree with the contention of the learned counsel for the defendant that the assessment of damages is a separate matter from the trial and as such the defendant could raise the issues relating to Suit No 22–631 C of 2003 and judgment dated 19 May 2010 during the hearing of encl 86.

[39] The principle of res judicata applies equally to the two stages of the case ie, the trial and the consequential hearing of assessment of damages. Hence, the D defendant cannot raise for a second time in the same suit an issue or matter that has already been considered and determined either expressly or by necessary implication.

Assessment of damages

E

[40] In the judgment, the order granted by the learned judge for damages to be assessed is as follows:

Ganti rugi untuk kemungkiran akujanji dan kecuaian oleh defendan ditaksirkan F oleh penolong kanan pendaftar

[41] In *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] MLRA 164, the Court of Appeal, held:

G [5] It is trite law that the task of taking of accounts and assessment of damages is an exercise of judicial discretion. Such discretion is a judicial one, as it is not to be exercised based on whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all the facts and evidence adduced before the officer or the judge who undertakes the assessment.

H [6] In our view the basic governing principles may be stated as follows:

The burden of proving damages is always on the parties claiming the damages. See *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; [1987] 2 MLRH 578 where Justice Edgar Joseph Jr (as he was then) said:

I *This brings to my mind the famous words of Lord Goddard in Bonham-Carter v Hyde Park Hotel* [1948] 64 TLR 177:

Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it. (Emphasis added.)

[42] Therefore, in order to succeed in his claim for damages equivalent to the market value of agri-land, the burden of proof is on the plaintiff to establish that he suffered loss as a result of the defendant's caused by the breach of undertaking and negligence in executing the second discharge of charge.

[43] In the instant matter, the learned judge had, in respect of the undertaking dated 14 March 2003, ruled that the defendant acted negligently and in breach of the duty towards the plaintiff. The learned judge also expressly held that by reason of the defendant's breach of duty imposed by the undertaking dated 14 March 2003 and its negligence, the plaintiff suffered the loss of the agri-land.

[44] Additionally, the Court of Appeal agreed with the said finding of facts of the learned judge by attributing the loss of the agri-land by the plaintiff to the negligent act of the defendant.

[45] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, Edgar Joseph Jr J (as His Lordship then was), stated:

> It is axiomatic that *a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages* before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.
>
> Thus nominal damages may be awarded in all cases of breach of contract. (See *Marzetti v Williams* (1830) 109 ER 842. And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example, *Dixon v Deveridge* (1825) 172 ER 50 and *Twyman v Knowles* (1853) 138 ER 1183.
>
> On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422, 438 namely, 'where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788, 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. *So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given* (see para 345 *McGregor on Damages* (15th Ed)). (Emphasis added.)

[46] Thus, in light of the specific finding of facts by the learned judge that the negligence of the defendant had caused the loss of the agri-land by the plaintiff, I hold that the plaintiff has proven the fact of damages (liability) against the defendant. As such, the assessment of the damages pursuant to the judgment would be in respect of the loss of the agri-land caused by the negligence of defendant.

[47] Hence, I find the defendant's contention at the hearing of encl 86, that the plaintiff was not entitled to claim the loss of the agri-land without basis and is contrary to the specific finding of facts made by the learned judge and affirmed by the Court of Appeal.

[48] As such, since the liability of the defendant has already been established, the other issue for determination is damages and quantum for the plaintiff's loss of the agri-land.

Quantum of damages

[49] The object of assessment of damages is, as far as possible, to put the plaintiff in the position, by means of monetary award, which he would have occupied if not for the wrong of the defendant, be that in tort or a breach of contract.

[50] In general, damages and/or loss ought to be assessed at the date of the judgment, ie, 9 November 2015.

[51] And, in light of the judgment that the defendant is liable to the plaintiff for the loss of the agri-land, I hold that the open market value of the agri-land would be the appropriate quantum for the loss suffered by the plaintiff.

[52] The plaintiff procured two valuation reports by AJC Property Surveyors Sdn Bhd dated 9 December 2019 ('AJC') and VPC Alliance (Pg) Sdn Bhd dated 7 August 2020 ('VPC'), in respect of the market value of the agri-land.

[53] AJC and VPC valued the agri-land as at 9 November 2015, at RM5,583,000 and RM5,700,000, respectively.

[54] The defendant also produced a valuation report by C H William Talhar & Wong Sdn Bhd dated 17 July 2020 ('CHW'), which states the market value of the agri-land as at 9 November 2015, to be RM5m.

[55] Having perused all the three said valuation reports, albeit all the valuers have adopted the comparable methods in coming to their conclusion, I agree

with the submissions of the learned counsel for the plaintiff that the valuation report by CHW did not give reasons for their opinion.

[56] CHW did not indicate how the value of the agri-land was determined, save by merely referring to a few comparables. CHW have not shown the necessary adjustments by taking into account pertinent factors such as time, size, location and ownership of the comparables vis a vis the agri-land.

[57] On the other hand, the valuation reports of AJC and VPC, have made the necessary adjustments by considering relevant factors such time, size and location of the comparables, as compared to the agri-land to form the opinions in their respective reports.

[58] In view of inadequate information in the valuation report by CHW, very little evidential value can be attached to the same. Hence, the valuation reports of AJC and VPC are to be preferred in assessing damages.

[59] Thus, I find that the learned DR did not err in the assessment of damages as the sum of RM5,583,000 is based on the market value of the agri-land. In this aspect, the valuation report of AJC and VPC have shown the market value of the agri-land on 9 November 2015 to be RM5,583,000 and RM5,700,000 respectively and the learned DR had accepted the lower sum of RM5,583,000 as the market value of the agri-land.

[60] Further, I find that the learned DR was correct in assessing the market value of the agri-land as at the date of judgment as the loss suffered by the plaintiff and also in awarding RM28,000 as special damages being the cost of the valuation reports.

CONCLUSION

[61] For the reasons stated above, I am satisfied that there is no error committed by the learned DR in his approach in assessing damages payable by the defendant to the plaintiff under encl 86.

[62] As such the decision of the learned DR is affirmed and the defendant's appeal is dismissed with costs of RM10,000, subject to the payment of allocatur.

Appeal dismissed with costs.

Reported by Nuzul Fitrie